DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	
Ameritech Operating Companies Tariff FCC No. 2 Transmittal No. 1312	
Nevada Bell Telephone Companies Tariff FCC No. 1 Transmittal No. 20	
Pacific Bell Telephone Company FCC Tariff No. 1 Transmittal No. 77	
Southern New England Telephone Companies Tariff FCC No. 39 Transmittal No. 772	
Southwestern Bell Telephone Company FCC Tariff No. 73 Transmittal No. 2906	

RECEIVED

NOV 14 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WC Docket No. 02-319

OPPOSITION TO DIRECT CASE

Thomas D. Hickey
Vice President and Deputy General Counsel
Robert H. McNamara
Senior Counsel – Regulatory

NEXTEL COMMUNICATIONS, INC.

2001 Edmund Halley Drive
Reston, **VA** 20191

Laura H. Phillips
Laura S. Gallagher

DRINKER BIDDLE & REATH LLP

1500 K Street, NW, Suite 1100
Washington, D.C. 20005-1209

Its Attorneys

November 14, 2002

TABLE OF CONTENTS

SUMMARY

SBC's Direct Case is a true masterpiece of literary fiction. In addition to suggesting that its proposed tariff revisions are necessary because SBC is teetering on the verge of financial disaster, SBC ignores its role as the only ubiquitous provider of interstate access in its telecommunications markets in its justification of vastly overreaching tariff revisions. SBC's revisions would require customers to make significant advance down payments and security deposits and substantially shorten the notice periods for a carrier customer's payment of a deposit, for bill payment and for termination of service. In essence, SBC's suspended tariff revisions would require customers to pay security deposits or prepayments whenever SBC feels the need. Not only do such provisions provide SBC with an additional unwarranted competitive advantage, but they unlawfully discriminate in favor of SBC's own affiliates and are contrary to established bankruptcy law principles.

Successful carriers, like Nextel, as well as those competitors that are struggling in today's market, have no economic alternative but to depend on SBC's special access services to offer service to their own subscribers. By filing a tariff that affords itself nearly absolute protection from the possibility of a carrier-customer's financial crisis, SBC violates Sections 201 and 202 of the Communications Act and benefits itself at the expense of competitors. Notwithstanding SBC's Direct Case position that its revisions are reasonable, SBC has not explained why it chose not to take other more competitively neutral approaches to address its purported new market insecurity. Indeed, as a price cap carrier, SBC should be expected to take market downturns as well as market upturns in stride. Instead, SBC seeks an absolute guaranteed return from its competitors, something that no carrier without market power or the ability to file tariffs could ever hope to achieve in a truly competitive marketplace.

In addition to discriminating in favor of SBC affiliates, the tariff revisions are inherently unreasonable because they include disputed amounts in the computation of customers' unpaid monthly balances and thus depict an inaccurate portrait of customers' actual credit history with SBC. More fundamentally, the tariff revisions are so vague and confusing that they fail to give adequate notice as to when the provisions may apply. The series of conditions that are supposedly tailored to indicate whether a carrier customer meets an "impaired credit worthiness standard," simply are not the barometers SBC claims would predict whether a particular customer will pay its interstate access bills. Indeed, the criteria used do not even take into account a customer's actual credit history with SBC.

Finally, SBC's security deposit scheme inappropriately reassigns the market risks SBC must bear to its carrier customers, giving SBC unwarranted financial protections that are not afforded price cap carriers. The suspended tariff revisions also contravene bankruptcy law and the statutory scheme of protections afforded to creditors thereunder. SBC is attempting to use the FCC's tariffing regime to place itself in front of all other creditors and bypass established bankruptcy principles in favor of its own protection.

Despite these obvious problems with the tariff revisions, SBC's Direct Case provided no new justification for its alleged need for the protections it would receive from these tariff changes or any examination of the consequences to competitors that would result from the revisions. In fact, SBC failed to provide the FCC with the underlying data it directly requested in the *Designation Order*. Quite simply, SBC has not proved its case that its patently discriminatory tariff changes are necessary to protect SBC from financial ruin. SBC's own earnings history and the information it provided in the Direct Case show the truth. The Commission must reject SBC's tariff revisions as unlawful.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Ameritech Operating Companies	)	
Tariff FCC No. 2	)	
Transmittal No. 1312	)	
	)	
Nevada Bell Telephone Companies	)	
Tariff FCC No. 1	)	
Transmittal No. 20	)	
	)	WC Docket No. 02-319
Pacific Bell Telephone Company	)	
FCC Tariff No. 1	)	
Transmittal No. 77	)	
	)	
Southern New England Telephone Companies	)	
Tariff FCC No. 39	)	
Transmittal No. 772	)	
	)	
Southwestern Bell Telephone Company	)	
FCC Tariff No. 73	)	
Transmittal No. 2906	)	

OPPOSITION TO DIRECT CASE

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby opposes the Direct Case filed by the Ameritech Operating Companies, the Nevada Bell Telephone Companies, the Pacific Bell Telephone Company, the Southern New England Telephone Companies, and the Southwestern Bell Telephone Company (collectively "SBC") in the above-captioned tariff investigation. Because SBC has failed to demonstrate either the need for or the reasonableness of the tariff revisions, Nextel requests the Federal Communications Commission ("FCC" or "Commission") to reject the proposed tariff changes as unlawful

I. INTRODUCTION

SBC has proposed interstate access tariff revisions that would require its customers to pay security deposits or prepayments whenever SBC determines these customers have impaired creditworthiness, a history of late payments or no established credit history. Specifically, customers owing SBC $1 million or more in service charges and with an "impaired creditworthiness," would be required to pay SBC a one-month cash deposit based on the amount of the prior month's service charges.[1] To avoid this, the customer could provide a letter of credit, a letter of guarantee, or a one-month pre-payment of service charges.[2]

The tariff provisions that SBC proposes would give SBC a significant advantage over its competitors, such as Nextel in the market. SBC's competitors remain dependent on SBC's network for interstate access services. In Nextel's case, Nextel relies on special access services purchased from SBC and other ILECs to offer its commercial mobile radio services in 197 of the top 200 U.S. markets.[3] At the same time, Nextel competes with ILEC affiliates, such as Cingular Wireless. Because SBC's proposed tariff revisions raised significant competitive concerns, Nextel, and several other carriers filed petitions to either reject or to suspend and investigate these tariff revisions.

---

[1] The term "impairment of creditworthiness" is defined *by SBC* at proposed Tariff Section 2.5.2(B). Specifically, the condition is triggered in any **of** five situations, such as when the customer's debt falls below investment grade as defined by the Securities Exchange Commission, when the debt is given the lowest investment grade by a nationally recognized credit rating organization, or when a customer states that it is unable to pay its debts as they come due.

[2] If the SBC customer has a history of late payments or no established credit history, it would be required to pay a two-month deposit, and if the customer fails to make the additional payments, it would be subject to termination of service.

[3] Nextel along with Nextel Partners, Inc. serve customers in the top 197 markets.

Finding that the tariff revisions raise serious issues about whether SBC is discriminating unfairly against its carrier customers and whether the tariff language "unambiguously sets forth a standard that can be objectively administered in a nondiscriminatory way,"[4] the Commission designated the proposed tariff revisions for an investigation. Specifically, SBC was directed to answer a series of questions designed to elicit the reasons why SBC believes the tariff revisions are necessary, fair and reasonable.

None of SBC's Direct Case responses support the proposed revisions to its tariffs. And SBC failed to demonstrate that its proposed security deposit/down payment provisions are just, reasonable and nondiscriminatory as required under Sections 201 and 202 of the Communications Act. Instead, SBC defends its tariff revisions as simply a form of commercial protection designed to save SBC from its own financial demise and potential bankruptcy.[5] Rather than attempting to "save itself" from insolvency, SBC is seeking to limit the scarce working capital of competitors, thus raising operating costs for financially healthy companies like Nextel, as well as for those carriers that are struggling with depressed demand and heavy

---

[4] *See* Ameritech Operating Companies, Tariff FCC No. 2, Transmittal No. 1312; Nevada Bell Telephone Companies, Tariff FCC No. 1, Transmittal No. 20; Pacific Bell Telephone Company, FCC Tariff No. 1, Transmittal No. 77; Southern New England Telephone Companies, Tariff FCC No. 39, Transmittal No. 772; Southwestem Bell Telephone Company, FCC Tariff No. 73, Transmittal No. 2906, Order, WC Docket No. 02-319, **DA** 02-2577, ¶ 14 (rel. October 10,2002) *("DesignationOrder").*

[5] Earlier this year, SBC was recognized as one of the world's top technology performers and as a company that is "best-positioned for growth in an economic recovery." *See SBC Communications Ranked Highest Among U.S. Telecom Providers In Business Week Study of Top Technology Performers; Business Week's Fifth Annual InfoTech 100 List Recognizes IT Providers Poised for Growth in Recovering Economy,* INTERNET WIRE, June 24,2002. Indeed, in 2001 SBC's special access revenues alone totaled $4,365,967,000.00 *See* Southwestern Bell Telephone, Pacific Bell, Nevada Bell, Southern New England Telephone, and Ameritech Companies, **ARMIS** 43-01, Row 1090, Column (s) (2001).

debt loads. From a policy perspective, the correct answer to SBC's purported problem is not to allow it to advantage itself at the expense of competitors, but to require it to participate in commerce on the same basis as its non-monopoly competitors.

Indeed, as described below, the proposed tariff revisions unreasonably discriminate against SBC's competitors. Moreover, the revisions are unjust and unreasonable because they include disputed amounts in the calculation of a customer's unpaid monthly balance, thus creating a distorted picture of the customer's actual credit record with SBC. In addition, the tariff revisions are so vague and ambiguous and that they do not provide SBC's customers with any certainty as to when and under what circumstances the provisions apply. Finally, SBC's suspended tariff revisions contravene bankruptcy law and the statutory scheme of protections afforded to creditors thereunder. SBC cannot use its tariffing authority to impose a pre-petition preference over other creditors for debts owed. This is not only anti-competitive, it is unlawful.

II. DISCUSSION

A. SBC Presents a Distorted View of its Position in the Telecommunications Market

SBC focuses its Direct Case on the "changed circumstances" in the market and how the downturn in telecommunications generally has affected SBC.[6] While admitting that it has raised its rates to accommodate an increased level of uncollectibles, SBC nevertheless claims that these increases are insufficient to protect against its increased market risks. According to SBC, the proposed tariff "protections" are necessary, otherwise "SBC could soon find itself before the bankruptcy court."[7]

---

[6] SBC Direct Case at 2.

[7] *Id.* at 3.

This statement is absurd and SBC's Direct Case demonstrates as much. Indeed, despite SBC's asserted involvement in "over 53 bankruptcies,"[8] SBC provides no indication that it is in any form of financial crisis. Rather, in response to the Commission's request for information concerning the deposits that SBC has required of its affiliates, SBC states that "SBC has not required deposits from its affiliates" because none of SBC's affiliates satisfied any of the specified "financial distress" criteria triggering a security deposit.[9] SBC further notes that "[n]one of SBC's affiliates have 'impaired creditworthiness' under the criteria set forth in SBC's proposed tariff revisions."[10] It strains credulity that SBC is in such dire financial circumstances when ***none*** of its affiliates have experienced the cash flow concerns that allegedly triggered SBC's determination to boost its security deposit provisions.

SBC's justification for new deposit requirements relies on its claims that the "risk of uncollectibles has increased exponentially over the past *two* years and there appears to be no end in sight."[11] Curiously, however, SBC's Direct Case lists the total amounts owed to SBC by customers who have defaulted on access charge payments as the following: $270 million at the end of 2000, $252 million at the end of 2001, and $285 million at the end of 2002.[12] For a company with reported interstate access revenues of $9,622,673,000.00, these year-to-year

[8] *Id.*

[9] *Id.* at 22.

[10] *Id.*

[11] *Id.* at 3.

[12] *Id.* at 14-15.

variations appear relatively minor.[13] Yet, it is on this data that SBC bases the purported "exponential" increase in uncollectibles.

Similarly, when directed to provide the data for the period January 2000 to the present regarding the "prepayment characteristics of defaulting interstate access customers during the year prior to the time the account was 90 days overdue,"[14] SBC states that the "requested information is extremely difficult to identify and not available at this time."" In particular, SBC claims that most of this information is "archived."[16] This non-response is impossible to reconcile with the relief that SBC seeks. SBC is requesting the FCC to allow it to require competitors to pay new up front payments and security deposits, yet it lamely excuses itself from providing the FCC with the underlying data SBC would reasonably have been expected to analyze preceding any decision to revise its tariff. This is not a minor point. Indeed, without this information, it is impossible to know whether the proposed tariff revisions are in fact designed to address the purported problem SBC has identified. SBC's Direct Case is incomplete and its tariff revisions should be deemed unlawful.

There can be no doubt that SBC overestimates its "peril" in the marketplace. SBC is a monopoly carrier that occupies a unique and coveted position in the telecommunications market. The evidence that exists demonstrates that SBC is far from a financially precarious position; as noted below, if SBC were operating under rate of return principles, it would be grossly

---

[13] *See* southwestern Bell Telephone, Pacific Bell, Nevada Bell, Southern New England Telephone, and Ameritech Companies, ARMIS 43-01, ROW 1090, Column (h) (2001).

[14] *Designation Order* at ¶ 25.

[15] SBC Direct Case at 28.

[16] *Id*.

overeaming. SBC's attempt to use the tariff process to impose economic hardships on rival companies must be rejected.

B. The Suspended Tariff Provisions Are Patently Unreasonable

In addition to being unnecessary, the proposed revisions are discriminatory and contrary to the public interest. For one, they unreasonably discriminate against SBC's competitors who have no economic alternative but to depend on SBC's established network for interstate access services. SBC has reserved to itself determination of the circumstances under which a particular carrier customer is required to render a down payment or security deposit. Indeed, the proposed revisions allow SBC to determine unilaterally which carrier customers, including its own affiliates, are subject to the security deposits and which are not. SBC admits that none of its affiliates are subject to the revised security deposit or down payment obligations. Nevertheless, SBC offers a hollow suggestion that there is no unreasonable discrimination because all carriers are treated equally: "SBC's proposed $1 million threshold is not restricted to any specific type of customers, but rather is applicable to all customers."[17] Plainly, this is untrue. SBC designed its tariff revisions to apply only to carrier customers and not to its affiliated entities which conveniently do not meet any of the criteria that trigger the security deposits and down payment provisions.

The tariff revisions also are unreasonable because they include disputed amounts in the calculation of a customer's unpaid monthly balance. Without any explanation, SBC states that it "includes disputed amounts in the amount billed to a customer for purposes of determining a

[17] *Id.* at 24.

customer's outstanding balance and late payment charged."" Inclusion of disputed amounts in the evaluation of a carrier customer's credit-worthiness, however, does not give SBC or the Commission an accurate picture of SBC's customers' financial relationship with SBC, including its credit history.

Indeed, it has been Nextel's experience that a high percentage of the bills that SBC sends to Nextel contain inaccuracies that lead to incorrect bills. Moreover, when Nextel does dispute an invoice from one of its vendors, including SBC, over 70 percent of the amounts that Nextel disputes overall ultimately are resolved in Nextel's favor." In other words, SBC's history with Nextel is one of overbilling. SBC ignores its own billing deficiencies in proposing to place customers in "default status" for nonpayment of inaccurate charges. This is unreasonable and should be declared unlawful.

C. The Suspended Tariff Revisions Are Vague and Ambiguous

The proposed new criteria for imposing deposits are vague and ambiguous in violation of Sections 61.2 and 61.54(j) of the rules." SBC has placed on the table a series of seemingly random criteria that purport to measure whether a carrier customer meets an "impaired credit worthiness standard." Recognizing this, the FCC required SBC to "explain how each of these criteria is a valid predictor of whether the customer will pay its interstate access bill. . . and shall

---

[18] *Id.* at 13.

[19] On average, over 60 percent of the disputed invoices with SBC and its operating companies result in credits to Nextel.

[20] Section 61.2 states that "all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2(a). Similarly, Section 61.54(j) requires that the "general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely . . . [and] [c]omplicated or ambiguous terminology may not be used . . . ." 47 C.F.R. § 61.54(j).

explain how . . . [these criteria] can be applied in a manner that will not produce arbitrary an/or discriminatory results.""

In response, SBC asserts, without providing data, that there is "substantial statistical support for the positive relationship between public credit ratings and probability of default."[22] SBC also claims that it "has developed objective criteria that rely on established third-party sources to avoid the very concerns raised by this question."[23] SBC offers nothing more to support the fairness of its chosen criteria.

SBC fails to provide any adequate basis for its five "credit worthiness" criteria, or to explain whether the five situations listed are the only instances when a carrier would be found to have credit worthiness problems. Critically, none of SBC's "credit worthiness" conditions take into account the customer's ***actual*** credit history with SBC or the fact that these conditions may not be reflective of a carrier's ability to meet its ongoing operating expenses.[24] There are distinct differences between a company's day-to-day operating expenses and its capital and debt expenses, which are typically much greater. Tracking of changes in carrier debt ratings by third party debt rating sources is by no means a reliable indication that the carrier is in financial

[21] ***Designation Order*** at ¶ ***20.***

[22] SBC Direct Case at **21.**

[23] *Id.*

[24] **4 s** the Commission recognized, "SBC has not shown that these [credit worthiness] criteria are valid predictors of the likelihood of a customer paying its access bill, or that they are better predictors of whether a customer will pay its bills in the future than the ***customer 'spastpayment history." Designation Order*** at ¶ ***20*** (emphasis added).

trouble or that it cannot cover its operating expenses.[25] As many petitioners stated, because ILEC-provided access is such a critical input to carrier-customer's ability to provide service, a heavy priority is placed on continued use of this access. That is the main reason that the creditworthiness criteria are not a reasonable commercial protection for SBC, but rather a convenient excuse to hamstring competitors.

Moreover, impaired "credit worthiness" could be found under SBC's tariff revisions in any instance when one of SBC's customers announces "publicly" that it is unable to pay its debts.[26] This is a completely ambiguous criterion and would permit SBC to require security deposits in any instance when SBC is "made aware" that a customer has financial woes. In other words, any carrier customer employee could announce in any public forum, whether true or not, that its company is in financial distress and SBC's tariff revisions would apply. This is an arbitrary result that allows SBC to benefit from any carrier customer misstatement or announcement over its perceived financial abilities.

Finally, SBC's proffered criteria are arbitrary because they are not tailored to achieve the stated intended results, As SBC asserts in its Direct Case, the criteria for determining a customer's credit rating are based on public credit ratings. They are not, as one would expect, based on a customer's existing relationship with SBC. Indeed, a customer's actual history with SBC appears to be irrelevant to SBC's determination as to whether it should require the customer

[25] Even assuming for the *sake* of argument that a company's debt profile has any direct relationship to its ability to pay SBC for access, the Commission must, as a matter of basic policy, consider whether SBC has the ability to protect itself in a manner less harmful to competition than shutting off service or diverting a competitor's cash flow based on its proffered criteria.

[26] *Designation* ***Order*** at ¶ 5.

to pay a security deposit or down payment. Without any evidence to support the proposed revisions or to demonstrate how these criteria were developed or relate in any way to a carrier customer's actual credit history with SBC, these proposed criteria are flawed beyond redemption.

D. SBC Ignores the Price Cap Implications of its Scheme

In addition to these problems, SBC's proposed security deposit scheme violates the basic principles of price cap regulation. In exchange for the opportunity to retain higher profits through increased productivity, price cap carriers were required bear the risks similar to those in a competitive market and forego guaranteed return on investment.[27] SBC's security deposit scheme instead would shift market **risks** to its carrier customers, providing unwarranted revenue protections at odds with the price cap regulatory regime. Not only should SBC be required to bear the risks inherent to price cap regulation, SBC has experienced nothing other than the rewards of the system in recent years.

In fact, while SBC claims a "dramatic and unprecedented" 40 percent increase in uncollectibles between 2000 and 2001,[28] this purported increase had no measurable effect on SBC's reported interstate rates of return for the same period. For example, SBC's reported return in 2000 for interstate services ranged from 10.56 percent (SWBT Texas) to 34.48 percent (Ameritech Michigan), and in 2001, its reported return ranged from 15.52 percent (SWBT

---

[27] ***See*** Policy and Rules Concerning Rates for Dominant Carriers, ***Second Report and Order,*** 5 FCC Rcd 6786, ¶ 22 (1990) (case history omitted).

[28] SBC Direct Case at 7.

Texas) to 30.27 percent (Ameritech Michigan)." And of those affiliates with a lower return in 2001 than in 2000, the lowest 2001 retum still exceeded 20 percent (Nevada Bell).

Moreover, even if increased uncollectibles did cause a measurable decrease in SBC's return—and there is no evidence of such a result—price cap carriers have the ability to adjust rates in response to changed market conditions, including the annual GDP-PI adjustment, low-end adjustments, and exogenous cost changes.[30] Though SBC claims that its ***currenf*** price cap rates do not adequately compensate it for the risk of uncollectibles because the annual GDP-PI adjustment "fails to measure the disproportionately negative state of the telecommunications sector,"[31] SBC itself explains that an exogenous adjustment would be appropriate. Directed to address the price cap modifications needed to account for the "increase [in] customer-supplied funding" and "reduc[tion of] SBC's exposure to defaults" under the security deposit scheme,[32] SBC responded that it should be permitted to "recover the increase in uncollectible expense through an exogenous adjustment[, which] would reflect adjustments made to capture uncollectible expense not embedded in the annual GDP-PI factors applied to price caps."[33] SBC does not dispute that these very same adjustments could be made to account for any increased

---

[29] southwestern Bell Telephone, Pacific Bell, Nevada Bell, Southern New England Telephone, and Ameritech Companies, ARMIS 43-01, Interstate Rate of Return, Row 1920, Column (h). It should be noted that during this two-year period, only one SBC affiliate, SWBT Texas, reported a return below the 11.25 percent return prescribed for rate-of-return carriers, and its 10.56 percent return in 2000 increased to 15.52 percent in 2001.

[30] ***Designation Order*** at ¶ 3.

[31] SBC Direct Case at 5.

[32] ***Designation Order*** at ¶ 15.

[33] SBC Direct Case at 10-11.

risk of uncollectibles, rather than the measures SBC proposes to inoculate itself against those risks at the expense of its customers.[34] Thus, SBC has no reasonable basis for implementing an anticompetitive security deposit scheme in lieu of available price cap adjustments, which it inexplicably has failed to invoke.

E. SBC Seeks Tariff Protections that Offend Bankruptcy Law

Under SBC's proposed revisions, an impairment of credit worthiness would he present "if the customer or its parent has commenced a voluntary receivership or bankruptcy proceedings or had one initiated against it."[35] In its ***Designation Order,*** the Commission directed SBC to address whether this provision is consistent with the U.S. Bankruptcy Code and precedents.[36] In response, SBC asserts that "nothing [in the U S . Bankruptcy Code] precludes utilities such as SBC from establishing tariff terms allowing for the collection of deposits from customers that have filed for bankruptcy."[37] Further, SBC suggests that the Commission "should take note of

---

[34] SBC reports that it currently has "factored a small level of uncollectibles in [its] rates", SBC Direct Case at 3, hut it has not proposed any further rate adjustment for uncollectibles. Instead, SBC would have its highest volume customers insure SBC against any potential for uncollectibles, based on the hare claim that "the loss of even one or two months of revenues from these customers could have a serious impact on SWBT." ***See*** SBC Tariff FCC No. 73, Transmittal. No. 2906 (filed Aug. 2, 2002), Description and Justification at 8 ("[SWBT and its affiliates'] top twenty-two customers account for over $300 million in monthly access service revenues . . . ."). SBC's perceived exposure to loss due to its customer distribution, however, is no different from any other market risk that SBC must hear as a price cap carrier.

[35] ***See, e.g.,*** Ameritech Tariff FCC No. 2, Original Page 40.2 and Original Page 40.3.

[36] ***Designation Order*** at ¶ 18 (citing 11 U.S.C. § 366).

[37] SBC Direct Case at 17.

the fact that numerous non-dominant carriers in the industry have tariffs in effect that permit them to protect their interests should a customer file for bankruptcy."[38]

SBC's argument that nothing directly prevents it from having a tariff address the collection of deposits from customers declaring bankruptcy is overreaching. For one, SBC is placing itself ahead of similarly situated, financially healthy creditors, such as Nextel. In fact, the tariff revisions seek to game the bankruptcy process and are contrary to bankruptcy law and the protections afforded to creditors thereunder. Section 366(b) of the Bankruptcy Code provides that utilities (including ILECs) may not discontinue service unless a debtor fails to provide "adequate assurance of payment, in the form of a deposit or other security" within twenty days of a bankruptcy court's order of relief.[39] And, federal bankruptcy courts have the "exclusive responsibility for determining the appropriate security which a debtor must provide to his utilities to preclude termination of service for non-payment of pre-petition utility bills."[40]

It should go without question that the bankruptcy courts have the experience and expertise that are necessary *to* balance the interests of all parties to a bankruptcy proceeding, and to determine the ultimate form that "adequate assurance" should take.[41] The FCC should not permit SBC and other dominant ILECs to impose their preferred form of assurance on parties and place itself above all other creditors. In addition, the FCC should recognize the exclusive

---

[38] *Id.*

[39] *See* 11 U.S.C. § 366(b).

[40] *See In re Adelphia Business Solutions,* 280 B.R. 63, 80 (S.D.N.Y. 2002) *(quoting In re Begley v. Phila. Electric Co.,* 41 B.R. 402,405-406 (E.D. Pa. 1984), *aff'd,* 760 F.2d 46 (3d Cir. 1985)).

[41] As bankruptcy courts have recognized, this issue is highly complex, and bankruptcy courts approach this issue on a case-by-case basis, weighing the unique facts of each scenario. *See, e.g., In re George C. Frye Co.,* 7 B.R. 856, 858 (Bkrtcy. D. Me. 1980).

responsibility of the bankruptcy courts to address this issue and prohibit SBC from using its tariffs as a self-help means of improving its legal position with respect to "adequate assurance" or to receive greater assurances than other creditors receive.[42]

In any event, SBC's suggestion that non-dominant carriers have tariffs that permit them to protect their interests in bankruptcy is completely misleading and in some cases, untrue. As SBC is aware, CMRS carriers do not and cannot file FCC tariffs for any purpose, including to protect their financial security as creditors. As a matter of policy, the FCC eliminated wireless carrier tariffs as unnecessary in a vibrantly competitive CMRS market.[43] Moreover, SBC could not point to a single tariff on file with the FCC that contained the same grossly overreaching security deposit and down payment provisions contained in SBC's proposed tariff revisions filed by a CLEC. Even if SBC could point to such similar tariff provisions, SBC simply fails to address its unique status as a dominant carrier that controls the access facilities essential for competitive carriers to operate in SBC's service territories. Unilateral tariffs filed by a dominant carrier simply cannot be compared to the tariffs filed by competitive carriers occupying the same market.[44]

---

[42] In fact, certain federal bankruptcy courts have concluded that adequate assurance to utility creditors can come in a variety of forms, and have rejected the notion that substantial security deposits or advance payments are necessary in every instance. ***See, e.g., Virginia Electric & Power Co. v. Caldor, Inc.,*** 117 F.3d 646,650-51 (2d Cir. 1997); ***In re Frye***, 7 B.R. at 858.

[43] ***See*** Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, ***Second Report and Order, 9*** FCC Rcd 1411, ¶ 179 (1994) ("Specifically, we will forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers. We also will temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service. At this time, because of the presence of competition in the CMRS market, access tariffs seem unnecessary.").

[44] Indeed, the FCC has often used dominant ILEC costs as a benchmark for competitive LEC access and other charges, not the other way around. And, as the FCC does not review filed

(continued...)

F. The Shortened Notice Provisions are Unlawful.

Nextel also opposes SBC's attempt to shorten the notice periods for a carrier customer's payment of a deposit, for bill payment and for termination of service. Specifically, SBC's suspended tariff revisions would decrease the amount of time SBC has to terminate service once a customer fails to make the required deposit with SBC and shortens the bill payment interval from 30 days to 21 days for these customers. Recognizing the potential problems inherent in shortened time frames. the Commission directed SBC to set forth the reasons that it believes the new time provisions are necessary to protect its interests and adequate to allow carrier customers to evaluate and the accuracy of the charges.[45]

In response, SBC states that the abbreviated notice provisions are "necessary to ensure that SBC can take prompt action to minimize its losses to 30 days, or close thereto, of unpaid debt."[46] SBC explains that the shortened payment periods for bill payment and deposits are "necessary to minimize the risk of uncollectibles"[47] SBC does not address how its shortened timetable allows customers the time necessary to evaluate their bills.

SBC fails to provide any basis for the imposition of new time intervals. Mere assertions that the shortened time frames will reduce SBC's risk of uncollectibles is simply not enough to support a reduction in the time carrier customer have to pay bills, make the required down

---

(..continued)
tariffs, the mere fact that a CLEC has filed tariff language that permits it to seek additional deposits in bankruptcy says nothing about whether such provisions are lawful.

[45] *Designation* ***Order*** at ¶ 31.

[46] SBC Direct Case at 29.

[47] *Id*.

payments and face the risk of terminated service. Indeed, there is no indication that a nine day reduction in the bill payment interval will materially reduce SBC's exposure to unpaid debt. Rather, the shorter period will cause new and unnecessary costs on other parties, including disruption and costly billing and network modifications for carrier customers that have been operating on the standard one month bill payment schedule with SBC for years. And, the shortened time frames also will unnecessarily require competitive carriers to hire additional personnel to adjust to the new billing cycles and down payment periods.

SBC had not justified the need for a shorter payment cycle or for a shortened security deposit deadline. Indeed, for healthy competitors like Nextel, that are dependent upon SBC's special access services to provision their networks, the 21-day deadline to pay a security deposit is totally unreasonable. All carriers, including financially secure ones, have an obligation to their investors to carefully monitor and manage their credit, debt, and liquidity to ensure that they meet investor expectations. Decisions affecting cash or a carrier's credit facilities are not casually made by any carrier and unilateral reductions in notice periods that directly affect those decisions, as well as customers' available cash flow should not be tolerated.[48]

[48] It is worth noting that the Commission's rules provide for a minimum 31 day notice period for the discontinuance of service so that end user customers can find another service provider. 47 C.F.R. § 63.71. While these rules do not apply to customer-specific disconnections for nonpayment, the same policy concerns are presented when the to-be-disconnected customer is a carrier whose own network will shut down if SBC turns off interstate special access circuits. The Commission's 31-day notice period is the minimum period needed to ensure that end-user customers are able to find an alternative service provider.

III. CONCLUSION

SBC designed tariff revisions to provide itself with unfettered discretion to apply new security deposits and advance payments based upon its own criteria. If permitted to take effect, these revisions would dramatically increase SBC's ability to control the fate of all competing camers in SBC's service territories. Even worse, SBC uses the Commission's tariff process to impose a result it could not achieve elsewhere. Nextel respectfully requests that the Commission find the revisions to be unlawful

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

Laura H. Phillips
Laura S. Gallagher

Its Attorneys

DRINKER, BIDDLE & REATH LLP
1500 K Street NW
Washington, D.C. 20005
(202) 842-8800

Thomas D. Hickey
Vice President and Deputy General Counsel
Robert H. McNamara
Senior Counsel – Regulatory
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191

November 14.2002

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, **a** legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 14" day of November, 2002, **a** copy of the foregoing "OPPOSITION OF NEXTEL COMUNICATIONS, INC. was sent via Messenger, electronic-mail and/or Facsimile, where indicated, to the following:

Marlene H. Dortch **(via Messenger) (4 copies)**
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

A. Alex Vega
Area Manager – Tariff Administrator **(via facsimile and overnight mail)**
Area Manager-Tariff Administration
Four Bell Plaza
Room 1970-04
Dallas, Texas 75202

Pricing Policy Division **(via Messenger) (3 copies)**
Wireline Competition Bureau
445 12th Street, S.W., Room 6-C222
Washington, D.C. 20554
ATTN: Julie Saulnier

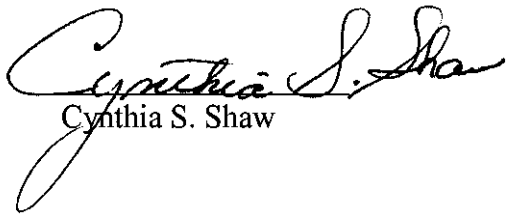
Tamara Preiss, Chief **(via E-mail)**
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Twelfth Street, SW
Washington, D.C. 20554

Judith Nitsche **(via E-mail)**
Wireline Competition Bureau
Federal Communications Commission
WCB/PPD
445 12th Street, S.W., Room 5-A225
Washington, D.C. 20554

Qualex International **(via Messenger) (1 copy)**
Portals II
445 12th Street, SW
Washington, D.C. 20554

William Maher **(via E-mail)**
Chief, Wireline Competition Bureau
Office of the Bureau Chief
Federal Communications Commission
WCB/PPD
445 12th Street, S.W., Room 5-A225
Washington, D.C. 20554

Davida M. Grant **(via U.S. Mail)**
Jeffrey A. Brueggeman
Gary L. Phillips
1401 Eye Street, NW
Suite 400
Washington, D.C. 20005
Attorneys for SBC Communications Inc.



Cynthia S. Shaw

NS